

TABLE OF CONTENTS

I.	INTRODUCTION	1
A.	Statement of the Case.....	1
B.	The Record Below	2
II.	SUMMARY OF ARGUMENT	3
A.	The Petitioned-for Unit Is Inappropriate Under Established Board Law	3
B.	The Regional Director’s Finding Is Inconsistent with the Test Articulated in <i>Specialty Healthcare</i> and Its Progeny	4
C.	The Record Facts Do Not Support the Decision’s Finding that the City and Road Drivers Are a “Readily Identifiable Group” Under the Very Test Cited by the Regional Director	7
III.	THE PROPOSED UNIT IS AN ARBITRARY SEGMENT OF AN APPROPRIATE UNIT AS DEMONSTRATED BY THE OVERWHELMING COMMUNITY OF INTEREST BETWEEN THE DRIVERS AND DOCKWORKERS	7
A.	The Record Facts Conclusively Establish an Overwhelming Community of Interest.....	7
1.	The Parkersburg Service Center	7
2.	City Drivers, Road Drivers and Dockworkers Have Virtually the Same Terms and Conditions of Employment	8
3.	The Company Cannot Provide Its Service Without the Thorough Functional Integration of the Dockworkers and Drivers	8
B.	The Regional Director’s Myopic View of Community of Interest Factors – Limited to Those Supporting a “Readily Identifiable Group” – Ignored the Overwhelming Overlap of Interests Between Drivers and Dockworkers	11
IV.	THE REGIONAL DIRECTOR MISCONSTRUED AND FAILED TO FOLLOW CONTROLLING PRECEDENT	13
A.	The Petitioned-For Unit Is Inappropriate Under Established Board Law	13
B.	The Petitioned-for Unit Is Inappropriate Regardless of the Rule of <i>Specialty Healthcare</i>	17
1.	The Petitioned-For Unit Is Not a “Readily Identifiable Group”	18
2.	The Dockworkers Share an Overwhelming Community of Interest With the Petitioned-For Unit	21
V.	CONCLUSION	23

TABLE OF AUTHORITIES

Other Authorities

29 C.F.R. 102.67(c).....	1
29 U.S.C. §§ 151(1)	4

NLRB Decisions

<u>Atchison Lumber and Logging Co.</u> , 215 NLRB 572 (1974)	14
<u>Bergdorf Goodman</u> , 361 NLRB No. 11 (2014)	4, 18
<u>Calco Plating, Inc.</u> , 242 NLRB 1364 (1979)	13, 22
<u>DTG Operations, Inc.</u> , 357 NLRB No. 175 (2011)	20, 21
<u>E.H. Koester Bakery Co., Inc.</u> , 136 NLRB 1006 (1962)	13, 14
<u>Grace Industries</u> , 358 NLRB No. 62 (2012)	21
<u>Guide Dogs for the Blind, Inc.</u> , 359 NLRB No. 151 (2013)	21
<u>Home Depot USA</u> , 331 NLRB 1289 (2000)	22
<u>International Bedding Company</u> , 356 NLRB No. 168 (2011)	15
<u>Levitz Furniture Company of Santa Clara, Inc.</u> , 192 NLRB 61 (1971)	19, 20, 22
<u>Macy's, Inc.</u> , 361 NLRB No. 4 (2014)	4, 5, 17, 18, 19, 21
<u>Marks Oxygen Co.</u> , 147 NLRB 228 (1964)	15
<u>Olinkraft, Inc.</u> , 179 NLRB 414 (1969)	14
<u>Overnite Transportation Company</u> , 331 NLRB 662 (2000)	14
<u>Specialty Healthcare and Rehabilitation Center</u> , 357 NLRB No. 83 (2011)	4, 5, 7, 17- 22
<u>Standard Oil Company</u> , 147 NLRB 1226 (1964)	14, 22
<u>Transway, Inc.</u> , 153 NLRB 885 (1965)	14

**EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION
TO THE NATIONAL LABOR RELATIONS BOARD**

I. INTRODUCTION

A. Statement of the Case

FedEx Freight Inc. (“the Company” or “the Employer”), by its undersigned counsel, submits this brief in support of its Request for Review of Regional Director Dennis P. Walsh’s December 18, 2014 Decision and Direction of Election finding that the unit petitioned for by the International Brotherhood of Teamsters, Local 175 (“the Petitioner” or “the Union”) consisting of city drivers and road drivers employed by the company at its Parkersburg service center located in Parkersburg, West Virginia is appropriate. The Employer makes this Request for Review: (1) because a substantial question of law and policy is raised by the Regional Director’s departure from officially reported Board precedent; (2) because the Regional Director’s decision on a number of substantial factual issues is clearly erroneous on the record, and these errors prejudicially affect the rights of the Company; and (3) there are compelling reasons for reconsideration of important Board rules or policies. *See* 29 C.F.R. 102.67(c).

The Regional Director’s Decision incorrectly found, *inter alia*:

- that a unit limited to city drivers and road drivers – excluding dockworkers – is appropriate;
- that the employees petitioned for by the Union are “readily identifiable as a group”;
- that the petitioned-for classifications do not spend a substantial amount of time performing dockworker functions;
- that the record did not establish dockworkers share an “overwhelming community of interest” with the city and road drivers; and
- that the petitioned for unit is not a “fractured” and “arbitrary segment” of the truly appropriate unit.

Moreover, the Regional Director failed to find that the only appropriate unit for purposes of collective bargaining is one that includes all full-time and part-time employees working on the dock at the Parkersburg service center including city drivers, road drivers, and dockworkers.

As fully discussed below, the Board should grant the Employer's Request for Review because the Regional Director's Decision ignored and misapplied controlling precedent. In addition, the Regional Director made findings that were either unsupported by, or contrary to, the testimony and documentary record evidence. Contrary to the conclusions reached in the Regional Director's Decision, as the record and controlling case law demonstrate, any unit that includes the petitioned-for employees must include, at a minimum, all dockworkers employed at Parkersburg, with whom the petitioned-for employees share an overwhelming community of interest.

B. The Record Below

The hearing in this case was limited to the admission into evidence of stipulated facts and exhibits. Decision at 1.¹ The parties' Joint Stipulation of Facts adopts relevant portions of the record of the hearing in FedEx Freight, Inc., 4-RC-133959 – a similar representation proceeding involving the Employer's service center at Cinnaminson, New Jersey. (Stip. at 1). The parties also stipulated that the post-hearing briefs filed in case 4-RC-133959 should be treated as part of the record herein. (Stip. at 5). The Regional Director accepted these stipulations. Decision at 1.

¹ Citations to pages in the Decision and Direction of Election are "Decision at ____." "Cinnaminson Decision at ____" refers to the Decision and Direction of Election in case number 4-RC-133959. "(Tr. ____)" refers to pages in the official transcript of the representation proceeding in case number 4-RC-133959. "(Bd. Ex. ____)," "(Er. Ex. ____)" and "(U. Ex. ____)" refer to the Board's, the Employer's and the Union's exhibits, in case number 4-RC-133959, respectively. "(Stip. at ____)" refers to the Joint Stipulation of Facts in this proceeding. "(Stip. Ex. ____)" refers to the exhibits referenced in the Joint Stipulation of Facts in this proceeding.

II. SUMMARY OF ARGUMENT

A. The Petitioned-for Unit Is Inappropriate Under Established Board Law

The Regional Director's conclusion that a unit limited to city and road drivers ignores record evidence that the dockworkers are utterly essential to the facility's operations. Their exclusion is illogical and functionally unworkable.

The Parkersburg service center has three job classifications at issue: city drivers, road drivers, and dockworkers. The Regional Director has carved out the dockworkers on the claim that the drivers are, alone, a "readily identifiable group" – a finding premised on the thinnest of distinctions and in plain disregard of the *absence* of any departmental divisions. In fact, city drivers and road drivers are two "readily identifiable groups", not one. The Decision differentiates the dockworkers from the drivers largely because the Employer does not require dockworkers to possess a CDL license and because they are not required to wear uniforms. These facts are simply insufficient to outweigh the functional integration and daily interaction between the drivers and dockworkers. The Regional Director does not dispute that the Employer's operation could not function without the dockworkers. The dockworkers are the glue that makes the three classifications a readily identifiable group.

The Decision and Direction of Election does not dispute that all three positions – city drivers, road drivers, and dockworkers – are subject to the same hiring process, the same personnel policies and procedures, and that they receive similar training. All can be paid at an hourly rate. They receive the same benefits, share the same break rooms, and utilize the same time clock. They are supervised by exactly the same supervisors and managers. The Company's dock-to-driver program results in dockworkers transferring to either a city driver or road driver position.

As a result, the city drivers, road drivers and dockworkers share such a strong and significant community of interest with one another that it is impractical and functionally unworkable to exclude dockworkers from any unit found appropriate. Further, requiring the Company to recognize such a bargaining unit would result in obviously untenable situations, promoting tension between the represented drivers and unrepresented dockworkers routinely performing the same work, side by side. As the Board has often pointed out, the purposes and policies of the Act are to minimize industrial strife, not promote it. *See* 29 U.S.C. §§ 151(1).

B. The Regional Director's Finding Is Inconsistent with the Test Articulated in *Specialty Healthcare and Its Progeny*

The unit found by the Regional Director is inappropriate under the standards of Specialty Healthcare and Rehabilitation Center, 357 NLRB No. 83 (2011). The Regional Director said:

Procedurally, the Board examines the petitioned-for unit first. If that unit is appropriate, the inquiry ends. It is only where the petitioned-for unit is not appropriate that the Board will consider alternative units, which may or may not be units suggested by the parties....

Decision at 3, citations omitted. Further, the Decision states:

In Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83, slip op. at 10-13 (2011), the Board clarified the framework to be applied in making unit determinations where a party seeks a unit that is broader than the petitioned-for unit. The Board first looks at whether the petitioner seeks a unit consisting of employees “who are readily identifiable as a group,” based on job classifications, departments, functions, work locations, skills, or similar factors, and whether these employees share a community of interest. In Macy's, Inc., 361 NLRB No. 4, slip op. at 8 (2014) and Bergdorf Goodman, 361 NLRB No. 11, slip op. at 2 (2014), the Board made it clear that whether the employees are “readily identifiable as a group” and whether they share a community of interest are two separate inquiries. If both standards are met, the party seeking a broader unit must demonstrate “that employees in the larger unit share an *overwhelming* community of interest with those in the petitioned-for unit.” [Emphasis added]. Additional employees share an overwhelming community of interest with

petitioned-for employees only where there is no legitimate basis upon which to exclude them from the unit because the traditional community-of-interest factors overlap almost completely. On the other hand, the Board will not approve a petitioned-for fractured unit that seeks “an arbitrary segment” of what would be an appropriate unit.

Decision at 3-4, some citations omitted. Taking the Specialty Healthcare² model first, the Regional Director analyzed whether the city and road drivers are “readily identifiable as a group.” He concluded that they are. Decision at 1, 8. The Decision states:

I find that these questions should be answered affirmatively. The petitioned-for unit is structured along the lines of classification, job function, and skills. The petitioned-for unit is a clearly identifiable group because, among other things, it “tracks a dividing line drawn by the Employer.” Macy’s, *supra*, slip op. at 9 (2014). Although the Employer insists that the Dockworkers and drivers are not part of separate departments, there is no question that the Employer treats the driver classifications differently in almost every operational and administrative sense.

Decision at 8. The Regional Director here ignores the undisputed evidence that the two driver classifications are *not* in any separate group from the dockworkers. (Tr. 18, 71). Note that although unstated here, the Regional Director, in his decision in the related representation case based on the same record, acknowledged the uncontroverted evidence that the sole indicia of a “department” was the Company’s Kronos timekeeping system – whose software segregates records by arbitrarily creating “departments” of different job classifications. Cinnaminson Decision at 2.

Although the Regional Director explained that the concepts of “a readily identifiable group” and the “community of interest” are “separate inquiries” (Decision at 3), the Decision

² The Employer posits that Specialty Healthcare was decided erroneously, largely for the reasons cited in Member Hayes’ dissent therein. However, on the assumption that the Board will not now revisit its decision there, the Employer alternatively contends that the case at bar was decided incorrectly even under the rule of Specialty Healthcare and its progeny.

selected a few facts relevant to the community of interest analysis in order to create an artificially identifiable group limited to drivers:

The Employer tracks drivers' work separately from that of the Dockworkers. It also keeps separate seniority lists for each of the driver positions and for the full-time Dockworker. The drivers wear uniforms that distinguish them from Dockworkers, who are allowed to perform their job duties in street clothes. As Class A CDL holders, City and Road Drivers are uniquely qualified employees dedicated to the operation of particular equipment. They are engaged in the same unique function, as the only employees who drive freight from place to place. Thus, the City Drivers and Road Drivers are readily identifiable as a group. Northrup Grumman Shipbuilding, *supra*, slip op. at 3.

Decision at 8. Thus, the Regional Director – who claims that the petition “tracks a dividing line drawn by the employer” and argues that “there is no question that the Employer treats the driver classifications differently in many operational and administrative aspects” – explains those differences are really only limited to clothing, licenses, and time records.

The Employer itself drew no “dividing line.” Rather, the petitioned-for unit certainly does not coexist along any departmental line. To the contrary, the petitioned-for unit carves out two of the three positions that are responsible for performing the work in the dock area at the Parkersburg service center. Indeed, the three positions are part of the same organizational group, with the same organizational goal: loading, unloading, and transporting freight. They interact and work with one another on a daily basis on the dock. They all are supervised and disciplined by the same manager and supervisors. The *only* unit that is coextensive with a departmental line is a unit including all three positions.

C. The Record Facts Do Not Support the Decision’s Finding that the City and Road Drivers Are a “Readily Identifiable Group” Under the Very Test Cited by the Regional Director

The petitioned-for city and road drivers have *different* job classifications and the work they perform is not the same. As acknowledged, but ignored by the Decision, there is no “driver” department. The functions they serve are similar, but performed differently – and the dockworkers are very much a part of their functions. The two driver classifications work in different locations – but are tethered together by their co-workers, the dockworkers. As noted by the Regional Director, drivers do perform dock work.

III. THE PROPOSED UNIT IS AN ARBITRARY SEGMENT OF AN APPROPRIATE UNIT AS DEMONSTRATED BY THE OVERWHELMING COMMUNITY OF INTEREST BETWEEN THE DRIVERS AND DOCKWORKERS

Proper analysis of the community of interest standard results in the conclusion that the Employer’s dockworkers share an overwhelming community of interest, overlapping virtually entirely with that of the petitioned-for unit. To exclude the dockworkers is to create an arbitrary segment of an appropriate unit, and a “fractured unit” within the meaning of Specialty Healthcare and long-standing Board law.

A. The Record Facts Conclusively Establish an Overwhelming Community of Interest

1. The Parkersburg Service Center

FedEx Freight Inc. provides LTL (Less-Than-Truckload) pick-up and delivery services for customers across the country. The Company operates numerous service centers including the Parkersburg service center located in Parkersburg, West Virginia. Decision at 2. The Parkersburg service center has 22 operational doors and one ramp door which are used for loading and unloading freight onto the trucks, as well as one trash door. Decision at 2. Currently working on the dock at Parkersburg are approximately 23 employees: 10 City Drivers,

11 Road Drivers, one part-time dockworker and one full-time dockworker/driver apprentice. Decision at 2. It is undisputed that at the Parkersburg Service center, the Service Center Manager and one Operational Supervisor supervise *all* employees on the dock including city drivers, road drivers and dockworkers. (Stip. at ¶¶ 7, 9, 20, 21).

2. **City Drivers, Road Drivers and Dockworkers Have Virtually the Same Terms and Conditions of Employment**

Part-time and full-time dockworkers, city drivers and road drivers are eligible to receive the same health benefits, personal time and participate in the Company's 401(k) plan. (Stip. at ¶¶ 23, 24). City drivers, road drivers and dockworkers can all be paid an hourly rate. (Stip. at ¶ 33). City drivers are paid their hourly rate whether they are driving or working on the dock. (Stip. at ¶ 33). Road drivers receive a mileage rate for road driving, but are paid an hourly rate for working on the dock. (Tr. 45-46).

City drivers, road drivers and dockworkers all share the same break room. (Stip. at ¶ 36). Dockworkers are not required to wear a uniform but can order a FedEx uniform similar to a city driver or road driver to wear while working on the dock. (Stip. at ¶ 37). City drivers, road drivers and dockworkers receive a uniform allowance. (Stip. at ¶ 37).

3. **The Company Cannot Provide Its Service Without the Thorough Functional Integration of the Dockworkers and Drivers**

As found by the Regional Director, dockworkers transport freight across the dock to and from trailers for loading and unloading. Decision at 6. Importantly, part-time dockworkers are referred to as "supplemental" because they supplement road drivers and city drivers *who themselves work on the dock* to ensure the Company can meet its operational needs. (Stip. at ¶¶ 10, 13, 25). City or road drivers who want to work on the dock can bump a part-time dockworker, or can be required to perform dock work depending on the Employer's needs. (Tr. 16-17).

Road drivers are responsible for picking up and delivering trailers with freight between service centers and/or turn-point locations via tractor-trailer combinations. (Tr. 48; U. Ex. 1). Road drivers require a class A Commercial Driver's License (CDL) and operate tractor-trailer combinations, including doubles and/or straight trucks. Road drivers may be required to perform the job duties of a city driver or a dockworker where operationally necessary. (U Ex. 1).

City drivers are responsible for picking up and delivering freight from customers with occasional pick-ups and delivery to service centers. (Tr. 48; U. Ex. 2). City drivers also require a class A CDL and operate tractor-trailer combinations, including doubles and/or straight trucks. (U. Ex. 2). City drivers may be required to perform the job duties of a road driver or a dock employee where operationally necessary. (Stip. at ¶ 26; Tr. 17; U Ex. 2).

The dockworker position is a springboard to a driver position. The Employer encourages dockworkers to train to become drivers through its “Dock-To-Driver” program which includes a five-week training course to assist dockworkers in getting their CDL. (Stip. at ¶ 14; Tr. 15). Those dockworkers who participate in the Program work as a full-time dockworkers but are also referred to as driver apprentices. (Tr. 15-16).

a. The Record Established that Drivers and Dockworkers Share Vital Responsibilities and Frequently Perform Work Within Each Others' Classifications

Although downplayed by the Decision, the record evidence is conclusive: city drivers and road drivers regularly perform many of the same job functions as dockworkers. In fact, most of the essential job functions of a dockworker are the same or similar to those of a city driver, such as:

- Perform freight handling using appropriate motorized and manual equipment, including but not limited to: forklift, pallet jack and hand truck.
- Secure freight inside trailers using appropriate tools and supplies, including but not limited to: pallets, straps and rope.

- Recoup/repair damaged freight when necessary.
- Verify and complete required documentation and reports.
- Comply with all applicable laws/regulations, as well as company policies/procedures.
- Perform other duties as required.

(U. Exs. 1- 3).

The essential functions of road drivers listed on the Employer's job description also include many of the same essential functions of a dockworker: road drivers must verify and complete required documentation and reports, load and unload freight, comply with all applicable laws and regulations, as well as Company policies and perform other duties as required. (U. Exs. 1- 3). In fact, one of the essential job functions of a road driver is to perform the job duties of a dock employee. *Id.*³

All three job descriptions include, as an "essential function," the performance of dockwork. (U. Exs. 1- 3). The essential job functions that all three positions have in common is work relating to the dock. Most significantly, city drivers and road drivers consistently perform dock work and are working side-by-side with the full-time and part-time dockworkers assisting with the loading and unloading of freight.

When a city driver or road driver performs work on the dock, the driver must swipe into the Kronos system as a dockworker.⁴ (Stip. at ¶¶ 17, 20; Tr. 18). This enables the Employer to track the number of hours worked by drivers as a dockworker. (Tr. 18). The record includes an

³ City drivers and road drivers have some similarities, but their jobs are not nearly the same. While both require a CDL and operate tractor-trailers (Tr. 50, 53), there are numerous differences. City drivers (and not road drivers) stay local and mainly handle pick-up and delivery routes to customers, not to other terminals. (Tr. 48). Thus, city drivers have essential job functions that include collecting cash/checks for freight charges from customers, communicating with customers to determine pick-up or delivery needs and soliciting additional business, asking for additional business from customers and providing leads to sales for potential new opportunities. (U. Ex. 2).

⁴ As noted by the Regional Director, Kronos is the Company's timekeeping system. (Tr. 18). For internal record keeping purposes, Kronos uses the term "department" to track the work being performed on the dock, city driving, and road driving. (Tr. 71). However, from an operational standpoint, there is no separate department for dockworkers, city drivers or road drivers, these are simply their job classifications. *Id.*

Employer report detailing the hours worked by city drivers, road drivers and dockworkers in the other respective positions for the time period of May 1, 2014 to October 31, 2014—six months. (Stip. Ex. 2). This report demonstrates there is a significant interchange and functional integration regularly occurring between the drivers and dockworkers.

The record establishes that city drivers, road drivers and dockworkers have significant interchange and functional integration. In fact, Employer Ex. 2 establishes that 10 of 21 drivers (over 47%) worked dock hours during the representative six-month period. One city driver, Roger Ross, booked 294.44 dock hours of his 1,025.43 paid hours. Similarly, road driver Michael Moyers worked 36.60 dock hours and had an estimated 802.85 road hours and road driver Daniel Wilson worked 35.13 dock hours of his estimated 742.15 road hours. (JSF Er. Ex. 2). To remove these hours to dock employees would be inefficient. Similarly, to have union and non-union employees working side-by-side would not enure to the industrial peace encouraged by the statute.

B. The Regional Director's Myopic View of Community of Interest Factors – Limited to Those Supporting a “Readily Identifiable Group” – Ignored the Overwhelming Overlap of Interests Between Drivers and Dockworkers

The Decision considers the traditional community of interest factors, but only to the extent that they supported the petitioned-for unit. As to the dockworkers, the Regional Director stated:

As the Board has explained, “additional employees share an overwhelming community of interest with the petitioned-for employees only when there ‘is no legitimate basis on which to exclude [the] employees from’ the larger unit because the traditional community-of-interest factors ‘overlap almost completely.’” The Employer has failed to meet this burden.

Decision at 9, citations omitted. Further, the Regional Director refused to include the dockworkers because:

(1) Dockworkers and the petitioned-for drivers have distinct classifications, job functions, and skill sets; (2) the groups earn strikingly dissimilar wages, hours and benefits; and (3) there is only limited, one-way interchange between the Dockworkers and the employees in the petitioned-for unit. The “mere fact” that the driver classifications may also share a community of interest with the Dockworkers is insufficient to render the smaller petitioned-for unit inappropriate.

Decision at 11. The Regional Director failed to assess the similarities between employees and the significance of their functional integration to the Company. The Decision *de facto* assessed the community of interest factors and found the two classes of drivers shared many of them, but ignored the fact that the dockworkers do too. Decision at 8-11.

- Employee skills and job functions: similar among drivers, but not to the exclusion of dockworkers.
- Common supervision: same among drivers, but the same among dockworkers.
- Contact and interchange: the record shows as much or more interchange and contact between dockworkers and drivers as it does between driver classifications.
- Similarities in other terms and conditions of employment: drivers do share similar terms, but almost entirely the same as dockworkers.
- Functional integration: unmistakably, the road and city drivers are essential functions for the Company to provide its service – but the dockworkers are absolutely essential to the work of both driver classes.

In sum, the Regional Director erred in using the factors above to find that the road and city drivers – alone – constitute a “readily identifiable group” and in not finding the petitioned-for unit to be a fragment of an appropriate unit.

IV. THE REGIONAL DIRECTOR MISCONSTRUED AND FAILED TO FOLLOW CONTROLLING PRECEDENT

A. The Petitioned-For Unit Is Inappropriate Under Established Board Law

As described above, the unit limited to the city drivers and road drivers is not an appropriate unit for bargaining because the evidence established there is a significant and overwhelming community of interest among all employees who regularly work on the dock.

The Board has long recognized in the trucking industry “the functional relationship of employees classified as truck drivers to the occupation of other employees or to the particular operation of the employer as a whole has been shown to be so integrated as to substantially minimize, if not eradicate, any real interests separate from those of other production employee, and truck drivers are therefore included in the production and maintenance units.” E.H. Koester Bakery Co., Inc., 136 NLRB 1006, 1009-1010 (1962).

Historically, the Board automatically included truck drivers in a unit if there was a disagreement over unit configuration. *Id.* at 1011. The Board, however, abandoned this automatic inclusion rule and returned to an analysis of community of interest factors. In E.H. Koester Bakery, the Board considered the following factors:

- (1) Whether [drivers] have related or diverse duties, mode of compensation, hours, supervision, and other conditions of employment; and (2) whether [drivers] are engaged in the same or related production process or operation, or spend a substantial portion of their time in such production or adjunct activities.

136 NLRB at 1011. Applying these factors, the Board has repeatedly held drivers and dockworkers (or even warehouse employees) must be included in the same unit. For instance, in Calco Plating, Inc., 242 NLRB 1364, 1365 (1979), the Board applied the E.H. Koester Bakery rule to conclude that drivers shared a sufficient community of interest with the production and maintenance employees to “require” their inclusion in the unit. The Board’s decision was based

on the fact that the drivers spent a substantial amount of time working with the production employees or in proximity of one another, and had the same supervision, comparable wages and fringe benefits. 242 NLRB at 1365; *see also* Standard Oil Company, 147 NLRB 1226 (1964) (drivers did not constitute a separate appropriate unit because drivers regularly spent a substantial amount of their time in the performance of the same functions as other employees at the service center, had common supervision, the same employee benefits and were paid on the same basis); Transway, Inc., 153 NLRB 885 (1965) (applying the principles of E.H. Koester Bakery, the Board held drivers must be included in a unit of loaders because drivers had such a close community of interest based on the fact that drivers and loaders spent a substantial portion of their time performing identical functions under common supervision and the degree of integration); Olinkraft, Inc., 179 NLRB 414 (1969) (drivers were not a functionally distinct group because they spent a substantial part of their regular work time performing work identical to that of other employees, including fork lift drivers and loaders); Atchison Lumber and Logging Co., 215 NLRB 572 (1974)(unit limited to drivers was inappropriate); *compare* Overnite Transportation Company, 331 NLRB 662 (2000) (petitioned-for unit of dockworkers and jockeys excluded city and road drivers because there was no common supervision, drivers performed a separate function, possessed special skills, worked away from the facility most of the day and the only evidence of interchange was a paltry 68 hours of loading by city drivers as compared to over 20,000 hours of driving).

Even in situations where there was no interchange/integration of functions, the Board has held there is an *inherent* community of interest between drivers and production employees in relation to the flow of materials into and out of the plant which was sufficient to find units

including drivers and production employees appropriate. *See International Bedding Company*, 356 NLRB No. 168 (2011) *citing Marks Oxygen Co.*, 147 NLRB 228, 230 (1964).

Here, the Employer's day-to-day dock operations and the individuals responsible for such operations are a highly integrated and functionally complete unit. City drivers, road drivers and dockworkers work closely together as a team on a daily basis to ensure the operational needs of the service center are met. There is a common goal: to load, unload and deliver freight. Cooperation and daily contact among these three positions on the dock is essential to the smooth operation of the Employer. As a result, the evidence overwhelmingly establishes a regular interchange of positions/responsibilities to ensure the overall objective of the Employer is met.

The common goal of moving freight is one of the reasons why the responsibilities of city drivers, road drivers, and dockworkers substantially overlap. This is evidenced by the "essential" job functions listed in each job description. City drivers and road drivers are required to perform many of the same essential job functions as dockworkers. In fact, most of the essential job functions of a dockworker are listed as essential functions on the job descriptions of city drivers and road drivers.

The Regional Director took a constrained view of the dock work performed by drivers. Rather than acknowledge the extensive evidence that drivers routinely and regularly perform work on the dock, the Decision diminishes the documented record. As described below, the record unequivocally demonstrated that a major proportion of dock work was performed by some drivers. (JSF Employer Ex. 2).

Moreover, the actual day-to-day work performed by city drivers and road drivers on the dock also establishes the functional integration of the city drivers and road drivers to the

dockworkers. Specifically, the evidence establishes a majority of drivers are paid for dock work and for some it constitutes a significant amount of their pay. (JSF Employer Ex. 2).

The mere fact that some dockworkers are called “supplemental” further supports a finding that the three job positions are inseparable. Dockworkers supplement the work the drivers cannot complete. In other words, drivers are responsible for performing dock work and, as set forth in their job description, may be required to perform dock work. The drivers and dockworkers also share common training and skills. Drivers and dockworkers all receive training for dock work upon hire and get certified to operate a fork lift.

Road drivers, city drivers and dockworkers have common supervision. The Service Center Manager and the Supervisor oversee all three positions and can issue disciplinary actions against any of the positions. There are no set supervisors for drivers or dockworkers.

Road drivers, city drivers and dock workers also share the same or similar wages, benefits and other terms and conditions of employment. All can be paid on an hourly basis and do receive the same health benefits and personal days, participate in the same 401(k) plan, have the same break rooms and attend the same employee functions/gatherings. Of note, road drivers are typically paid solely on a mileage basis. However, here, road drivers are assigned an hourly rate because of the expectation/requirement that road drivers perform either dock work or city driving or both. While there are some differences in benefits, the reason is due to the “part-time” designation, not the underlying position. Dockworkers are not being denied benefits because they are dockworkers; it is because they are only part-time.

Based on a review of the community of interest factors found relevant in driver unit cases, the nature of the business and the manner in which drivers and dockworkers work together on a day-to-day basis to ensure the timely delivery of freight, the drivers and dockworkers share

such a strong a community interest, it is self-evident that the only appropriate unit is a unit including all full-time and part-time city drivers, road drivers and dockworkers.

The Regional Director downplayed these facts, emphasizing the relatively less significant differences between drivers and dockworkers. Although it is beyond question that a significant portion of driver work occurs *as dock work*, the Decision prefers to focus on the dockworkers' lack of the drivers' "unique" qualifications (no CDL). Decision at 9. Likewise, the Regional Director relies on the drivers' off-site duties but ignores the routine – often daily – duties they have when working on the dock. *Id.*

B. The Petitioned-for Unit Is Inappropriate Regardless of the Rule of *Specialty Healthcare*

As the Regional Director cited recently, the Board, in Macy's, Inc., 361 NLRB No. 4 (2014), explained the principles of Specialty Healthcare as follows:

...when a union seeks to represent a unit of employees "who are readily identifiable as a group (based on job classification, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit ... if the petitioned-for unit satisfies that standard, the burden is on the proponent of a larger unit to demonstrate that the additional employees it seeks to include share an "overwhelming" community of interest with the petitioned-for employees, such that there "is no legitimate basis upon which to exclude certain employees from "the larger unit because the traditional community of interest factors 'overlap almost completely.'"

361 NLRB, slip op. at 7. Applying Specialty Healthcare to the facts of this case does not change the conclusion that the Union's petitioned-for unit is inappropriate and the smallest appropriate unit must include all part-time and full-time city drivers, road drivers and dockworkers.

1. The Petitioned-For Unit Is Not a “Readily Identifiable Group”

As detailed by the facts above, city drivers and road drivers are not themselves a “readily identifiable group” absent the dockworkers. Rather, the proposed unit is an “arbitrary segment” of an appropriate unit, and a “fractured unit” within the meaning of Specialty Healthcare and long-standing Board law.

A key consideration as to whether a petitioned-for unit is a “readily identifiable group” is whether the unit is “coextensive with a departmental line that the Employer has drawn.” Macy’s, 361 NLRB, slip op. at 8. *See also* Bergdorf Goodman, 361 NLRB No. 11, slip op at 3 (2014) (despite commonalities, the Board held employees within petitioned-for unit did not share a sufficient community of interest to render the unit appropriate, in part, because the “boundaries of the petitioned-for unit [did] not resemble any administrative or operational lines drawn by the Employer.”). As described above, the Decision embraced this concept and found the petitioned-for unit to be such “a clearly identifiable group because, among other things, it ‘tracks a dividing line drawn by the Employer.’” Decision at 8. This is not accurate.

The petitioned-for unit is not coextensive along a departmental line. To the contrary, the petitioned-for unit carves out two of the three positions that are responsible for working in the dock area at the Parkersburg service center. It is acknowledged by the Regional Director that there is no record evidence stating drivers and dockworkers have separate departments. Rather, the three positions are part of the same organizational group, with the same organizational goal: to load, unload and transport freight. They interact and work with one another on a daily basis on the dock. They all are supervised and disciplined by the Service Center Manager and the Operational Supervisor. The only unit that is coextensive with a departmental line is a unit including all three positions.

The Board also must consider whether the petitioned-for employees share a community of interest. In Macy's, the Board said it would examine the following factors:

Whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between the classification; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; interchange with other employees; have distinct terms and conditions of employment and are separately supervised.

361 NLRB, slip op. at 8. As described in detail above, an analysis of these factors establishes the petitioned-for unit cannot be found to share a community of interest that is separate and apart from the dockworkers. Thus, the city drivers and road drivers are not a readily identifiable group but an “arbitrary segment” of an appropriate unit, and a “fractured unit” within the meaning of Specialty Healthcare.

The Regional Director incorrectly dismissed the significance of the Board’s rule in Levitz Furniture Company of Santa Clara, Inc., 192 NLRB 61, 63 (1971), in which the Board held drivers did not constitute a “separate identifiable unit” with special interests sufficient to warrant their separate representation. Why? Because the Levitz drivers were under the same supervision as other employees, received substantially similar benefits, worked the same hours, and were paid on the same basis. *Id.* Importantly, the fact that there was regular and frequent interchange with other employees outweighed drivers spending a majority of time away from the plant. *Id.*

The facts in the case at bar are even more compelling than in Levitz:

- Separate Department: As noted above, the road drivers and city drivers are in the same department as the dockworkers. There is no separate driver and dock departments.
- Distinct Skills and Training: All three positions are trained to perform dock work upon hire, including operating a fork lift and loading and unloading freight.

- Distinct Job Functions/Perform Distinct Work: All three positions perform dock work. Many of the essential functions of drivers are identical to those of dockworkers. In fact, road drivers and city drivers are specifically advised that an essential function of their job is the performance of dock work.
- Functionally Integrated: City drivers and road drivers regularly perform dock work on a weekly and daily basis.
- Frequent Contact with Other Employees: City drivers and road drivers have daily contact with dockworkers and often are working directly with or next to dockworkers.
- Distinct Terms and Conditions of Employment: All positions share the same break room, medical benefits, personal days and 401(k). All full-time positions share the same vacation benefits.
- Separately Supervised: All three positions are supervised by the Service Center Manager and the Operational Supervisor and can be disciplined by either.

In short, the city drivers, road drivers and dockworkers are in the same department, have common supervision, perform the same or similar functions and skills, all work on the dock and interact/intermingle and work together on a daily basis towards a common goal/objective – to load, unload, and timely delivery freight. Due to the Company’s organizational structure and the complete integration of road drivers, city drivers, and dockworkers on the dock, it cannot be concluded that city drivers and road drivers are a “readily identifiable group.” The only readily identifiable group must include city drivers, road drivers, and dockworkers.

The Regional Director disputed application of Levitz Furniture Company of Santa Clara, because that case did not consider the Specialty Healthcare test of “whether the disputed employees share an overwhelming community of interest with the unit employees.” Decision at 10, *citing* DTG Operations, Inc., 357 NLRB No. 175 (2011), slip op. at 8, fn. 23. However, the Regional Director did not address the numerous cases (cited above) regarding unit composition in the trucking industry (in which dockworkers were regularly included in a drivers’ unit). Those cases, as well as Levitz Furniture are controlled by footnote 29 in Specialty Healthcare in which

the Board specifically stated that its decision was not intended to “disturb any rules applicable only in specific industries.”

2. The Dockworkers Share an Overwhelming Community of Interest With the Petitioned-For Unit

As the Board stated in Macy’s, two groups share an *overwhelming* community of interest when their community of interest factors “overlap almost completely.” Macy’s, 361 NLRB, slip op. at 9. Here, the facts establish the petitioned-for city drivers and road drivers’ community of interest factors overlap almost completely with dockworkers. In fact, city drivers and road drivers actually have more in common with dockworkers than with one another. This renders the Union’s petitioned-for unit inappropriate even under the analysis set forth in the Specialty Healthcare decision.

In the few cases decided after Specialty Healthcare, the emphasis by the Board in determining whether petitioned-for employees have an overwhelming community of interest with additional employees has been on whether the petitioned-for employees worked in a separate department, reported to different supervisors, worked in separate physical spaces, and had functional integration. *See* Grace Industries, 358 NLRB No. 62 (2012); DTG Operations, Inc., 357 NLRB No. 175 (2011); Guide Dogs for the Blind, Inc., 359 NLRB No. 151 (2013). This reached its current peak in Macy’s, in which the Board held that a key component of a contested, petitioned-for unit is whether the unit sought “tracks a dividing line drawn by the employer.” Despite the finding by the Regional Director that the drivers here do track an organizational line of the Employer, the record conclusively holds the opposite. There is no “drivers only” department. Rather, the operational structure is more akin to grouping work associated with the dock which includes the drivers. Thus, the petitioned-for unit is contrary to

the organizational structure of the Employer because it is excluding the dockworkers. This factor weighs heavily against a finding that the petitioned-for unit is appropriate.

Moreover, the factors, discussed more fully in the sections above, prove the overwhelming community of interest factors among city drivers, road drivers and dockworkers. Unlike the cases decided after Specialty Healthcare, here, there is common supervision, skills, benefits, and wages, as well as substantial integration and almost daily interaction and interchange with each other. See Calco Plating, Inc., 242 NLRB 1364, 1365 (1979) and Standard Oil Company, 147 NLRB 1226 (1964).

The Board has made clear that the decision in Specialty Healthcare did not create a new community of interest test. Nor did it abandon “various presumptions and special industry and occupational rules” or rules applicable only in specific industries. 357 NLRB, slip op. at 13, fn. 29.⁵

Consequently, the extensive precedent regarding appropriate units in the trucking industry remains very much in effect. Accordingly, under any standard applied by the Board, the facts warrant a finding that the petitioned-for unit of only city drivers and road drivers is inappropriate. Rather, the smallest appropriate unit must include city drivers, road drivers, and dockworkers, including driver apprentice.

⁵ In an order denying review in Fedex Freight, Inc., 4-RC-134614, a similar case concerning Fedex Freight employees in the Employer’s East Philadelphia, Pennsylvania, Member Johnson opined that the extent of integration between the drivers and dockworkers was not adequate to create an all-inclusive unit because the extent to which drivers in the workplace at issue there performed dockworker duties did not rise to the “30-40%” level found in Home Depot USA, 331 NLRB 1289 (2000), cited at 4-RC-134614, Order dated 10/14/14, fn. 1. The Board’s articulation in Home Depot USA did not establish a numerical guide for determining the percentage of similar work needed to trigger a finding of unit inclusion. Indeed, in that case, the Board reviewed the traditional criteria for unit inclusion, applying the broad review of Levitz Furniture Co. of Santa Clara, Inc., 192 NLRB 61 (1971). 331 NLRB at 1291. Moreover, the record evidence in the case at bar demonstrated that over 40% of the drivers performed dock work, establishing at the very least that a significant portion of petitioned-for employees performed dock work – a proportion consistent with the spirit and intention of the Home Depot holding.

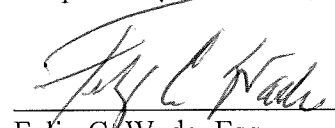
V. CONCLUSION

As the foregoing demonstrates, the Union has petitioned for a unit of employees who do not share a separate community of interest. The petitioned-for unit is a fractured unit, an arbitrary segment of what would be an appropriate unit— a unit including city drivers, road drivers, and dockworkers (including the driver apprentice). The cobbling together of two job titles who do not themselves work together, but who share an overwhelming community of interest with dock employees is inappropriate. The two job classifications petitioned for simply do not share a mutuality of interests that are not shared by other service center employees, and, accordingly, do not constitute an appropriate bargaining unit.

Contrary to the Regional Director's conclusion, based upon the record evidence, the Regional Director should have found the Petitioner's requested unit inappropriate and that the smallest appropriate unit must include all full-time and part-time city drivers, road drivers, and dockworkers, including the driver apprentice. Accordingly, the Employer respectfully requests that the Board grant its Request for Review of the Regional Director's Decision.

Dated: December 31, 2014

Respectfully submitted,



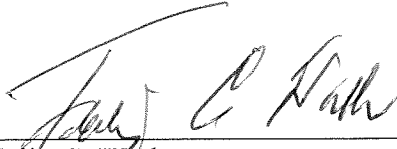
Felix C. Wade, Esq.
Ice Miller LLP
250 West Street
Columbus, OH 43215
Phone: 614.462.2276
Fax: 614.228.3673
Pete.Wade@icemiller.com

Ivan Rich, Jr.
FedEx Freight Inc.
1715 Arron Brenner Drive, Suite 600
Memphis, TN 38120

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served via Federal Express and electronically on this 31st day of December, 2014, upon the following:

Luke Farley, Esq.
IBT Local 175
267 Staunton Avenue
South Charleston, WV 25303-2503
Lfarley.175@suddenlinkmail.com



Felix C. Wade